Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
October Term, 1998

Charles F. Hockenbarger,
Petitioner

vs.

State of Kansas

ON PETITION FOR WRIT OF CERTIORARI TO THE KANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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34 pp

This petition pertains to a criminal conviction of an anti-homosexual religious picketer for battery and criminal restraint. During a picket outside a church, the church's clergy assaulted and battered members of the picketing group with a hammer. Some picketers responded in defense, including petitioner. The local prosecutor, notorious for her public hostility and political campaigning against these "hate picketers", prosecuted the picketers, treating the clergy as a victim.

For a period, the criminal cases were stayed by a federal court. After the stay was lifted, petitioner sought dismissal on the grounds of speedy trial rights and prosecutorial bias and bad faith. The trial court denied relief on speedy trial grounds, finding that the informal appearance used by the local court did not constitute an actual or constructive arraignment, and statutory speedy trial time was tied to arraignment, which had not occurred. Petitioner was formally arraigned the next day, which was the day trial began. The trial court also denied relief on the grounds of prosecutorial bias and bad faith.

On appeal the Kansas Court of Appeals held that the initial appearance was not an arraignment; criminal defendants have no speedy arraignment right; and it was in the discretion of the trial court whether to disqualify a prosecutor who had a religion-based public hostility toward a criminal defendant.

A. WAS IT ERROR FOR THE KANSAS COURT OF APPEALS TO HOLD THAT CRIMINAL DEFENDANTS HAVE NO RIGHT TO A SPEEDY ARRAIGNMENT?

B. WAS IT ERROR FOR THE STATE COURTS TO IGNORE A PRACTICE ESTABLISHED BY THE TRIAL COURT AND PROSECUTOR OF INFORMALLY ARRAIGNING MISDEMEANOR DEFENDANTS, AND TO REFUSE TO TREAT THAT APPEARANCE AS AN ARRAIGNMENT FOR SPEEDY TRIAL PURPOSES?

C. WAS IT ERROR FOR THE KANSAS COURT OF APPEALS TO HOLD THAT THE EXISTENCE OF A "PUBLIC HOSTILITY" BY A PROSECUTOR TOWARD A CRIMINAL DEFENDANT, IN THE CONTEXT OF RELIGIOUS PICKETING, WAS INSUFFICIENT GROUNDS TO DISQUALIFY THE PROSECUTOR OR AFFORD OTHER RELIEF TO THE CRIMINAL DEFENDANT?

D. WAS IT ERROR FOR THE STATE COURTS TO FIND NO SELECTIVE PROSECUTION BY COMPARING PROSECUTORIAL DECISIONS RELATED TO PICKETING INCIDENTS TO OTHER NON-PICKETING GARDEN VARIETY BATTERY AND UNLAWFUL RESTRAINT PROSECUTIONS, INSTEAD OF COMPARING PROSECUTORIAL DECISIONS REGARDING THE PICKETERS TO PROSECUTORIAL DECISIONS REGARDING THOSE WHO ATTACKED THE PICKETERS?

E. WAS IT ERROR TO COUNT THE TIME THAT PASSED DURING THE FEDERAL COURT STAY AGAINST PETITIONER, WHEN THE STAY WAS OCCASIONED BY THE PROSECUTOR'S BAD FAITH, AND THEREBY DEPRIVE PETITIONER OF A SPEEDY TRIAL, BOTH STATUTORY AND CONSTITUTIONAL?

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REFERENCE TO OFFICIAL REPORT OF OPINION

The opinion was unpublished.[1]

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment or decree sought to be reviewed: The Kansas Court of Appeals' opinion was issued February 20, 1998.

B. Date of any order respecting a hearing: On March 19, 1998, the Kansas Court of Appeals denied petitioner's Motion for Rehearing or Modification. On April 28, 1998, the Kansas Supreme Court denied petitioner's Petition for Review.

C. Statutory provisions conferring on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: 28 U.S.C. Section 1257 permits review by writ of certiorari of a final judgment by the highest court of a State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

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[1] The only parties to the proceeding at the lower court are reflected in the caption. Petitioner's co-defendants at trial were his father, Karl D. Hockenbarger, and two other church members, Timothy B. Phelps and Jonathan B. Phelps.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Sixth Amendment to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...

Fourteenth Amendment to the United States Constitution, Section 1: .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WHERE THE CONSTITUTIONAL ISSUES WERE RAISED WITH THE STATE COURTS

Petitioner raised his constitutional right to a speedy trial before the trial court on a motion to dismiss. Petitioner raised his constitutional right to an unbiased prosecutor before the trial court on a motion to dismiss. Evidentiary hearing and oral argument were conducted on these issues on January 11, 1996. Both of these issues were also raised in briefs and argument to the Kansas Court of Appeals and Kansas Supreme Court. Also, petitioner raised his right to a timely arraignment before the Kansas Court of Appeals and Kansas Supreme Court. This point was raised after the trial court arraigned petitioner, over his objection, the day of trial, after finding that the previous arraignment had in effect not constituted a proper arraignment.

CONCISE STATEMENT OF THE CASE

This petition pertains to a criminal conviction of a young man because of events arising out of a religious anti-homosexual protest. Petitioner is a member of a church group which actively engages in street preaching in the form of picketing. This religious picketing resulted in considerable local controversy, and strong opposition by some government officials and local clergy. The picketing also resulted in some occasional physical attacks of the picketers, forcing them to defend themselves.

Petitioner is a member of Westboro Baptist Church, a small Old School Baptist Church in Topeka, Kansas. Beginning in early 1991, Westboro began a ministry of public religious pickets with a central message of "God Hates Fags". In connection with the ongoing debate in this country about homosexuality, Westboro and her picketers are determined to introduce into the discussion, through lawful picketing, such messages as "Why did God Destroy Sodom and Gomorrah?", "Fear God, Not Fags," "God's Hate is Great," "Your Preacher is Lying", "God Controls All Hearts," "You Judge Every Day," "Judge Between Good and Evil," "Love = Truth", "Fags = AIDS = Death", "Hate is a Bible Value," "Wages of Sin is Death", "AIDS Cures Fags" and "No Fags in Heaven".[2]

This picketing has resulted in severe opposition by some segments of society, most notably politicians and clergy. In short, politicians find it politically expedient to publicly objurgate the picketers, and promise and attempt (if/when elected) official action against them, to foil or stop the picketing.

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[2] These are samples of extant signs carried by petitioner and others during ongoing religious anti-homosexual pickets.

Clergy innately contradict the picketers, because the message of the picketing is in sharp conflict with the "don't-call-a-sin-a-sin-judge-not-God-loves-everybody-unconditionally-you-can-live-like-the-devil-and-still-go-to-heaven" heresy that radiates from virtually every pulpit in America today.[3] This posture of most religious organizations has caused churches to be a principal battleground in the homosexual debate.

In September 1993 petitioner was with a group picketing outside a church in Topeka, Shawnee County, Kansas. The clergy of the church approached the picketers in anger, with a raised hammer (just used to hammer a "love" sign into the ground in opposition to the picketers' "hate" signs). Several men in the group of picketers responded in defense after the clergy struck some of the picketers with a hammer. The clergy was physically restrained until police arrived.

A month later, the local prosecutor, who has for years actively engaged in an openly hostile campaign against the picketers, and who has prosecuted them scores of times (largely without success), filed charges against five of the picketers, including four men who restrained the clergy, and one female who gave a statement to police when they arrived. (This female

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[3] It is worth noting in passing that a few short decades ago this was not the case. A cursory reading of the writings of the likes of John Knox (Presbyterian), Martin Luther (Lutheran) and Jonathan Edwards (Congregationalist) -- to name a few -- would disclose that this message was commonplace and thundered from every American pulpit when this nation was founded, under the blessing of God. Strong evidence for the possibility God has washed his hands of this nation is found in what serves as "preaching" in most churches today.

was and has been an active legal representative of the group in numerous proceedings against the prosecutor.) No charges were filed against the clergy, and he was treated by the prosecutor as an innocent "victim" throughout the proceedings.

To be more specific regarding the prosecutor's public posture toward these picketers, we should illustrate the evidentiary record briefly. The evidence most decidedly does *not* bespeak a proper prosecutorial righteous indignation toward dangerous criminal behavior. Rather, it tells of religious-based personal hostility and political aggrandizement. The prosecutor's official files, for instance, contain an enlargement of a dictionary definition of the word "heresy" with the words "See, Phelps, Fred" added.[4] Official files also contain letters on prosecutor letterhead to local clergy, bitterly decrying Westboro's doctrines, including the blessed doctrine of reprobation, with promises to take official action against the church and her members. The prosecutor's political rhetoric and literature includes mocking cartoon depictions of the picketers (as Neanderthals), and grandiose promises, such as "A vote for me is a vote to get the picketers off the streets". In addition, scores of incidents are recounted in the record of the prosecutor making statements directly to picketers, reflecting personal hostility toward and against them and their religious beliefs. Examples are "God loves everybody"[5], "I feel sorry for your

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[4] Fred Phelps is the pastor of Westboro Baptist Church.

[5] This language is the international rally cry of the ecumenical faction, the religious group most active in opposition to Westboro Baptist Church's ministry.

children because you don't celebrate Christmas"[6] and a variety of other displays of open written and spoken hostility. None of the evidence supports a separation of the hostility and political campaigning from the *message* of the picketing. Rather, it supports a religion-based official hostility that is virtually unprecedented in the history of jurisprudence, and makes detritus of every constitutional tenet upon which this nation was made.

Bitter personal hatred of the picketers and their ideas, in her individual capacity, is the prosecutor's absolute right, and not at issue here.[7] The difficulty is that she makes every prosecutorial decision about the picketers based on that oft voiced hostility. As one federal judge described it, "The plaintiffs offer evidence from which one could infer selective prosecution. Whenever violence has erupted on the picketing lines, the defendant either has filed charges against one or more

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[6] On religious grounds, Westboro's members publicly decline to participate in many of the religious "holidays" which, in their view, constitute little more than elaborate idol worship, a fact well known in the Topeka community.

[7] The trial court said in passing that the prosecutor's political speech was probably protected speech. This concept is not in dispute here. It raises the interesting question of whether, if the prosecutor had targeted her political rhetoric onto a group of people because of their race, for instance, or national origin, whether this would be afforded such protection. Even so, at issue here is not her rhetoric, no matter how banal, untrue or foolish. Rather, at issue is her prosecutorial decision making, the motive for which is reflected in her rhetoric.

of the plaintiffs or has charged no one saying the evidence was insufficient or inconclusive."[8]

The state courts ignored this aspect of selective prosecution, perceiving that theory to apply *only if* the prosecutor had never prosecuted another person under the same law. Regardless of the measure of evidence that the prosecutorial decisions were (a) selective and (b) driven by an unlawful animus. This unlawful animus caused this prosecutor to file literally scores of criminal charges against various of the picketers, under generic statutes, felony and misdemeanor.[9]

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[8] *Phelps, et al. v. Hamilton*, 840 F.Supp. 1442, 1457 (D.Kan. 1993). Petitioner was one of the plaintiffs in this action; the defendant Hamilton is the prosecutor at issue here. Following this decision, the criminal case at issue here was stayed for a period of over a year. Later, the case was reassigned to a federal judge outside of Kansas, who dismissed the case on full faith and credit grounds. That dismissal was later reversed in part by the Tenth Circuit, *Phelps v. Hamilton*, 122 F.3d 1309 (10th Cir. 1997), but by then this case had proceeded to trial.

[9] Out of all these cases, the prosecutor gained a total of four misdemeanor convictions, including this one, one of which was reversed on appeal. After much was made of her utter refusal to prosecute anyone who attacked the picketers, no matter how severely, under the watchful eye of some courts, this prosecutor filed a few token cases against those who attacked the picketers, such as a young man who bombed one family's home. In those few occasions, the prosecutor granted leniency whenever and wherever she was able, and failed to give those cases the vigorous personal attention she afforded those filed against the picketers.

While this is not the form selective prosecution more commonly takes[10], it is equally as repugnant to the Constitution, and should not have been ignored by the state courts. It is difficult to imagine a court turning away a criminal defendant seeking relief,

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[10] Selective prosecution is more commonly seen in the application of a questionable law to a specific identifiable group, for whom the law was often passed. Or in the use of a law not otherwise in use against a specific person or group.

(A good illustration of this is the manner in which the prosecutor has applied the Kansas criminal defamation statute against Westboro Baptist Church's preacher. On account of published preaching, the prosecutor has attempted over a dozen criminal charges against Fred Phelps under this statute -- all of which have failed for want of probable cause -- while prosecuting *no one else ever* under the statute. The Kansas criminal defamation statute is rarely used by any prosecutor, and is largely -- appropriately -- dormant. Some scholars have noted that the great danger of a criminal defamation statute is that it lurks in dormancy available to prosecutors with improper motives.)

Out of these cases a prima facie method has been developed, which requires the criminal defendant to illustrate that no similarly situated person has been prosecuted under the law at issue. The prima facie case should not swallow the rational for the legal principle, which is what has happened in this case. Prima facie showings historically have merely been methods of putting the burden of proof on one party or the other. They have never taken away the underlying legal principle. In this case, the underlying legal principle exists to prohibit a prosecutor from making prosecutorial decisions on an unlawful basis. That legal principle was utterly ignored in this case.

if he provided evidence that the prosecutor, first, campaigned on a promise to rid a certain affluent part of town of all blacks, and second, after being elected, based on that promise, began prosecuting blacks who were found in the neighborhood, under generic laws such as loitering and disturbing the peace. In such a case, the criminal defendant could not show that no one had ever been prosecuted under those laws, and that would not be the method of proof he would use to show unlawful animus. The same reasoning holds true here.

The charges against the four men, including petitioner, did not go to trial until January 1996. After the federal court stay was lifted, petitioner timely filed a motion to dismiss on grounds of speedy trial, both statutory and constitutional. Petitioner also filed a motion to dismiss on the grounds of prosecutorial bias and bad faith.

A change of venue had been earlier granted to nearby Douglas County, and the case was assigned to an out of county judge for trial. The day before trial, a hearing was held by the assigned judge on the motions to dismiss. During the argument, the focus was placed on statutory speedy trial time (on the apparent assumption that the stay period was chargeable to defendant rather than the State, leading to the view that constitutional speedy trial was not at issue).

The Kansas statute regarding speedy trial says a person charged with a crime and held to answer on an appearance bond shall be brought to trial within 180 days after arraignment. K.S.A. 22-3402(2). This is the time the Kansas legislature has designated as a period of time which satisfies the constitutional requirement for a speedy trial, suggesting any period longer than this is presumptively unconstitutional. See *Doggett v. United States*, 505 U.S. 647, 652 and n. 1, 112 S.Ct. 2686, 2691 and n. 1, 120 L.Ed.2d 520 (1992) (delay "presumptively prejudicial" at

least as it approaches one year).

It is undisputed that, if the first appearance by petitioner constituted an arraignment, more than 180 days chargeable to the State had passed without petitioner being brought to trial. During the hearing on petitioner's motion to dismiss, his counsel described to the assigned judge the practice in Shawnee County for arraigning misdemeanor defendants which had been established by the court and prosecutor, not the defendants or defense bar. The trial court questioned the prosecutor about this practice, and she specifically agreed that the practice was as petitioner's counsel described it, saying: "A docket was to be called; and in Shawnee County, again, with misdemeanors, the defendants don't have to appear if counsel appear for them and waive the appearance, but that is the first appearance, or, quote, 'arraignment,' of the defendants." (Tr., 1/11/96, p. 24.) Thus, the State agreed that the first appearance, whether attended by the defendant, counsel, or both, was what Shawnee County considered to be and set up as the arraignment.

Even so, the state courts found that the first appearance did not constitute an arraignment in accordance with K.S.A. 22-3205.[11] Hence, the trial court arraigned petitioner the next day,

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[11] K.S.A. 22-3205 says concerning an arraignment:

> (a) Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead.... [I]f the crime

January 12, 1996, the day of trial.

After hearing evidence of the prosecutor's denude and undisguised political and personal hostility toward petitioner's religious picketing, preacher and church, the trial court denied the motion to dismiss, but said he would protect petitioner from hostile treatment by the prosecutor during the trial.

At trial, three of the men were acquitted, and petitioner was convicted of battery and unlawful restraint.

Petitioner appealed to the Kansas Court of Appeals, saying if the arraignment did not actually occur until the day before trial, he was denied a constitutional right to a speedy arraignment. The Kansas Court of Appeals held that criminal defendants have no right to a speedy arraignment. That court specifically held that "The only time a *formal* arraignment was conducted in *open court* in this case was on January 12, 1996, the day of trial. Using this date, there was no violation of the statutory right to a speedy trial." (Emphasis in original.) Then, answering petitioner's contention that if the arraignment did not occur until the day of trial, the *arraignment* was not timely, the same court said, "There is no constitutional right to a speedy arraignment per se, and there is no statutory time limit on arraignment in misdemeanor cases."

Petitioner also raised issues related to the prosecutor's bias. The Kansas Court of Appeals held that in spite of the prosecutor's public hostility, the trial court had the discretion whether or not to disqualify the prosecutor, and had not abused his discretion in denying the motion.

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charged is ... a misdemeanor, with the approval of the court, the defendant may appear by counsel.

Review was sought to the Kansas Supreme Court and denied.

REASONS THE WRIT SHOULD ISSUE

A. IT WAS ERROR FOR THE KANSAS COURT OF APPEALS TO HOLD THAT CRIMINAL DEFENDANTS HAVE NO RIGHT TO A SPEEDY ARRAIGNMENT.

Without explanation, the Kansas Court of Appeals held that criminal defendants have no right to a timely or speedy arraignment.

The Kansas Supreme Court has stated in a different context that criminal defendants have a right to a speedy arraignment. "To obtain the benefit of diversion, K.S.A. 1985 Supp. 22-2909 requires the individual charged with DUI to enter into a contract with the prosecutor waiving all *rights* under the *law or the constitution* of Kansas or of the United States to *a speedy arraignment*, preliminary examinations and hearings, *a speedy trial*, and the right to a jury trial." *State of Kansas v. Priest*, 239 Kan. 681, 682, 722 P.2d 576, 577(1986); emphasis added. This provision in the Kansas statute is typical of diversion statutes in all jurisdictions. The right to a speedy arraignment, as a separate and distinct right to a speedy trial, is commonly acknowledged. Indeed, what would the point of an arraignment be, if it was not speedily afforded?

The Kansas federal court has stated in a different context that criminal defendants have a *constitutional* right to a speedy arraignment. "In this case, the court can conclude from the face of the diversion agreement that [the criminal defendant] voluntarily participated in diversion and waived his *constitutional rights to a speedy arraignment*, preliminary hearing, *a speedy trial* and trial by a jury." *Swanson v. Fields*,

814 F.Supp. 1007, 1014 (D.Kan. 1993), *affirmed*, 13 F.3d 407; emphasis added.

Apparently the Kansas legislature believes criminal defendants have a right to a speedy arraignment, causing it to enact a series of statutes in the criminal procedure code which tie certain important events in the criminal prosecution to a timely arraignment, in addition to the statutes which require criminal defendants to waive the right to a speedy arraignment before entering diversion. For instance,

K.S.A. 22-3212(f) requires that discovery be completed no later than 20 days after arraignment.

K.S.A. 21-4624 requires the prosecutor to file written notice of intent to seek the death penalty not later than five days after the time of arraignment.

K.S.A. 22-2618 requires the filing of a motion for change of venue at or before arraignment.

K.S.A. 22-3201 requires that witnesses be identified no later than arraignment.

K.S.A. 22-3208(4) requires the filing of a motion to dismiss at any time prior to arraignment.

K.S.A. 22-3212 requires discovery to be completed no later than 20 days after arraignment.

K.S.A. 22-3437 requires the filing of a notice of intent to proffer a certificate and report concerning forensic examinations within 20 days after arraignment.

K.S.A. 59-29a14 requires the county or district attorney to file a special allegation of sexual motivation within 10 days after arraignment in specified cases.

K.S.A. 22-3406 says: "After arraignment, the defendant shall be entitled to a reasonable time to prepare for trial.

None of these statutory provisions could be satisfied if the criminal defendant was arraigned the day of trial. Further,

what these statutes illustrate is that if an arraignment is not timely, and the State has no obligation to provide a timely arraignment, then other rights of the criminal defendant can be defeated through the back door, most notably the right to a speedy trial.

In *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), this Court held that where state law required defendants to plead the defense of insanity at arraignment; to make a plea of abatement at arraignment; and to move to quash based on systematic exclusion of one race from grand juries or on any other ground that the grand jury was otherwise improperly drawn at arraignment; the Court concluded the arraignment was a "critical stage" of the criminal case, so the defendant had a right to counsel at the time of arraignment. By the same process of reasoning, where Kansas law imposes a variety of obligations and rights on the criminal defendant at the time of, or fixed by time in some manner to, the point of arraignment, this makes the arraignment a "critical stage" in Kansas, hence it should be timely done. This is consistent with Justice Stewart's observation in his dissenting opinion in *Escobedo v. State of Illinois*, 378 U.S. 478, 493-94, 84 S.Ct. 1758, 1766, 12 L.Ed.2d 977 (1964): "Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced." How can a rule of law stand that says this event – which marks the beginning of the case – can occur whenever it is convenient for the State?

The right to a speedy or timely arraignment is consistent with the purpose of an arraignment. An arraignment occurs to ensure that a criminal defendant does not sit in a jail, uncharged, without access to counsel, without being told the charges

against him. The arraignment occurs for the protection of the defendant and various constitutional rights he has in a criminal case. It is utterly inconsistent with all of these rights for the arraignment to occur the day of trial, or on any other date that is untimely or which does not afford the criminal defendant a speedy trial. Under Kansas law, by tying the statutory speedy trial right to the arraignment, and then by finding that there is no right to a speedy arraignment, the Kansas state courts have effectively taken away the right to a speedy trial.

B. IT WAS ERROR FOR THE STATE COURTS TO IGNORE A PRACTICE ESTABLISHED BY THE TRIAL COURT AND PROSECUTOR OF INFORMALLY ARRAIGNING MISDEMEANOR DEFENDANTS, AND TO REFUSE TO TREAT THAT APPEARANCE AS AN ARRAIGNMENT FOR SPEEDY TRIAL PURPOSES.

The state courts erred in finding that the first appearance mandated for criminal defendants in misdemeanor cases was not an arraignment. The first appearance was established by the court and prosecutor, and imposed on petitioner. The State has the obligation to arraign defendants, and take them to timely trial, and this appearance was established as the method of fulfilling this obligation. Criminal defendants are not granted other alternatives in Shawnee County. The prosecutor agreed that this first appearance was an arraignment, a fact which the state courts completely ignored.

Further, the first appearance fully satisfies the requirements of an arraignment. The first appearance is used to ensure that the defendant knows what he is charged with, and has an opportunity to plead. This process, by statute, does not require the appearance of the criminal defendant in person, and may be attended solely by his attorney.

Kansas statute does not mandate the personal appearance of the criminal defendant in misdemeanor cases, and instead expressly allows the defendant to appear through counsel. See K.S.A. 22-3205. There is no logic, therefore, to the requirement imposed in this case that the arraignment constitute a formal event in "open court". Rather, the purpose of an arraignment is satisfied by the informal process established in Shawnee County.

The Kansas appellate courts have not hesitated to find a constructive arraignment when criminal defendants claimed they were not properly arraigned. See *State v. Jakeway*, 221 Kan. 142, 558 P.2d 113 (1976) (defendant can waive arraignment); *State v. Huber*, 10 Kan.App.2d 560, 704 P.2d 1004 (1985) (same); *Poore v. State*, 5 Kan.App.2d 210, 613 P.2d 963 (1980) (if defendant knows and understands charges, failure to provide copy of information or indictment does not vitiate plea). Yet when the criminal defendant in this case rested on the informal constructive arraignment established by the court and prosecutor, the state courts invalidated the arraignment to avoid application of the speedy trial statute. This is inconsistent with the common sense approach to determining what constitutes an arraignment described by the Kansas Supreme Court in *State v. Allison*, 259 Kan. 25, 35, 910 P.2d 817 (1996). And hereby the state courts have applied the arraignment statute in a manner which deprived petitioner of a speedy trial and a speedy arraignment.

C. IT WAS ERROR FOR THE KANSAS COURT OF APPEALS TO HOLD THAT THE EXISTENCE OF A "PUBLIC HOSTILITY" BY A PROSECUTOR TOWARD A CRIMINAL DEFENDANT, IN THE CONTEXT OF RELIGIOUS PICKETING, WAS INSUFFICIENT GROUNDS TO DISQUALIFY THE PROSECUTOR OR AFFORD OTHER RELIEF TO THE CRIMINAL DEFENDANT.

Petitioner supplied the trial court with a significant amount of evidence, including documents and oral testimony, which left no conclusion but a raw, open, brazen, religion-animus-fueled hostility by the prosecutor toward the picketers. The State responded by showing the trial court print outs of cases filed against other defendants for battery and unlawful restraint, and by offering the prosecutor's self serving statement that her undenied bias has had no impact on her prosecutorial decisions. This caused the trial court to deny relief from the prosecutor's hostility, other than to promise to keep an eye on her during trial.

The Kansas Court of Appeals recognized the prosecutor's "public hostility"[12] toward the picketers, but said

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[12] The opinion of the Kansas Court of Appeals described the hostility as "public" and "mutual". This reflects careless reasoning. Again, at issue here is not whether the prosecutor is fully justified in her hostility. Nor at issue is whether or to what degree any of the picketers have formed some hostility of their own because of her fierce mistreatment of them under the prosecutorial cloak. (What free born American would not chafe under such raw tyranny? That's like condemning the colonists for disliking the British.) In fact, there was *zero* evidence in the record that any picketer had personal hostility, as every bit of the evidence reflected

it was a matter of discretion with the trial court whether or not to disqualify a prosecutor with such hostility. The Court rested its conclusion on the fact that it felt no prejudice had been demonstrated, and therefore the prosecutor's bias constituted harmless error. This is a fundamental flaw in the reasoning of that court.

This Court has held that the bias of a juror or judge can never be treated as harmless error. This is because such bias is considered to be foundational error, and is of such a nature that it is impossible to separate it from the outcome. Thus, no matter the evidence of guilt, if a criminal defendant shows bias in a juror or judge, the defendant is given relief from the conviction. The defendant is never required to assume a burden of showing how the bias crept in and impacted the outcome. It is an un-get-at-able thing, because it lurks in the heart and the defendant has no access. No access to the judge's chamber. No access to the jury room. No access to the hearts of these fact finders. Similarly, the defendant has no access to the prosecutor's office or decision making process. See, e.g., *Tumey v. Ohio*, 273 U.S.

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instead an incredulous posture by all the picketers and their counsel. But what if the record bore a basis for a conclusion that every single picketer personally hated the prosecutor with a burning passion? So what? They have no official power; they are not acting as the government; they are not bound to modulate or restrain official power to ensure that no unlawful motive is found or constitutional right violated. At issue here is whether the prosecutor has an unlawful animus guiding her prosecutorial decisions, not whether the picketers hate her back. The record evidence indicates that the prosecutor is utterly heedless of the constitutional rights of these picketers, and eagerly runs roughshod over those rights in pursuit of political and personal gain.

510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

(Even with those forms of constitutional error which are not deemed foundational -- to which the "harmless error rule" can be applied -- the burden of proof rests with the prosecutor to demonstrate that prejudice *did not* occur. It never is imposed upon the defendant to show a lack of prejudice when the Constitution has been violated. Thus, for instance, if evidence was unlawfully seized and is wrongly admitted, the conviction will be set aside unless the *prosecutor* proves *no prejudice*. See, e.g., *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988): "Our conclusion [that testimony on future dangerousness violated the Sixth Amendment] does not end the inquiry because not all constitutional violations amount to reversible error. We generally have held that if the **prosecution can prove beyond a reasonable doubt** that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." (Emphasis added.) Thus, even if prosecutorial bias was properly considered a form of constitutional error which did not require automatic reversal, in this case the state courts did not properly impose on the prosecutor the duty of demonstrating no impact on the outcome by virtue of the prosecutor's unfeigned bias.

In *Vasquez v. Hillery*, 474 U.S. 254, 262, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986), this Court discussed the manner in which a grand jury could impact the rest of the criminal prosecution: "Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital

offense–all on the basis of the same facts." Certainly the same and more is true of a prosecutor.

Further, this Court has said that if a prosecutor deliberately charges a defendant on account of an unlawful basis (such as race), a conviction "cannot be understood to cure the taint". *Vasquez, supra*, citing *United States v. Batchelder*, 442 U.S. 114, 125, and n. 9, 99 S.Ct. 2198, 2205, n. 9, 60 L.Ed.2d 755 (1979). The infusion of bias into criminal proceedings creates a "fundamental flaw" which is "never ... thought harmless" because it "undermines the structural integrity of the criminal tribunal itself". *Vasquez, supra*. "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez, supra*. A unique risk is present when it is the prosecutor who acts with bias. "[W]hen a prosecutor discriminates by striking racial minorities in open court and in front of the entire jury pool, [t]he Court expressed concern that this tactic might encourage the jury to be lawless in its own action." *Campbell v. Louisiana*, ---- U.S. ----, 118 S.Ct. 1419, 1423-1424, 140 L.Ed.2d 551 (1998).

This record reveals potent and persistent public and private statements, written and oral, by the prosecutor reflecting a strong religion-based hostility and bias against this petitioner and other picketers. The prosecutor should not be allowed to evade the consequences of her improper prosecutorial bias by merely asserting that she has not permitted that bias to impact her decisions. "A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias." *Wilkerson v. Texas*, 493 U.S. 924, 927-

928, 110 S.Ct. 292, 295, 107 L.Ed.2d 272 (1989).

This case does not present an instance of a conflict of interest, where an abuse of discretion standard may be appropriate. Rather, it presents a case of unfettered unpretentious unconstitutional religion-based animus, which is so intense that it necessarily must impact every decision this prosecutor makes about this petitioner and all his fellow picketers. For years she has done so, and for years this great wrong has been ignored, through the application of inapposite legal principles and a glossing over of the great constitutional precepts at issue. In the United States of America, prosecutors don't get to prosecute people because of their religious beliefs!

D. IT WAS ERROR FOR THE STATE COURTS TO FIND NO SELECTIVE PROSECUTION BY COMPARING PROSECUTORIAL DECISIONS RELATED TO PICKETING INCIDENTS TO OTHER NON-PICKETING GARDEN VARIETY BATTERY AND UNLAWFUL RESTRAINT PROSECUTIONS, INSTEAD OF COMPARING PROSECUTORIAL DECISIONS REGARDING THE PICKETERS TO PROSECUTORIAL DECISIONS REGARDING THOSE WHO ATTACKED THE PICKETERS.

As noted above, one of the reasons relief was denied regarding the prosecutor's bias – on the theory of selective prosecution – was because others had been prosecuted under the statutes used to prosecute petitioner. With respect, this entirely misses the point. The *purpose* of the legal principle which prohibits selective prosecution is to prevent prosecutors from exercising the awesome power of the prosecutor's office with an impure heart. An impure heart under the Constitution includes a heart full of religious malice. There is no doubt this prosecutor has a heart full of religious malice. The fact that her malice only impacts her prosecutorial decisions concerning

picketing incidents does not make the process any less unlawful.

This Court has said: "The Equal Protection Clause prohibits selective enforcement 'based on an unjustifiable standard such as race, religion, or other arbitrary classification.' *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962)." *United States v. Betchelder, supra*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979).

A criminal defendant can make a showing of selective prosecution by showing discriminatory effect and discriminatory purpose. "A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." *Wayte v. United States*, 470 U.S. 598, 610, 105 S.Ct. 1524, 1532, 84 L.Ed.2d 547 (1985). "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a difference race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 1487, 134 L.Ed.2d 687 (1996). This Court has said the "similarly situated" requirement is necessary to ensure that the federal courts do not interfere with the prosecutorial process without good cause. *Id.*, 517 U.S. at 467, 116 S.Ct. at 1487.

The question this petition presents is how to define the "similarly situated" in a case of this sort. The existence of bias can not be denied. In addition, the record evidence shows a pattern by the prosecutor of responding to persons involved in picketing incidents very differently, depending on the views held by the picketers. For instance, documents from the prosecutor's file show that when a person becomes angry with the picketers and physically attacks them, she declines to prosecute for the stated reason that the person was angered by the content of the signs, and thus his unlawful physical attack was legally justified. Indeed, that's exactly what happened in this case. The man who

raised a hammer against the picketers -- the "victim" in this case – was *never* viewed as a possible suspect, because he is part of a group of clergy whose religious views and disagreement with the picketers is wholeheartedly and publicly embraced by the prosecutor. In case after case, when incidents occur – creating a pool of people involved in picketing incidents – the prosecutorial decision, by an admittedly religion-hostile prosecutor, resulting in the picketers or no one being prosecuted.

The state courts assumed that in the absence of a showing by petitioner that *no one* had ever been prosecuted for battery or unlawful restraint, that petitioner could not make a prima facie case, as a matter of law. Petitioner respectfully submits this misses the mark concerning the equal protection rationale underlying the theory of selective prosecution.

E. IT WAS ERROR TO COUNT THE TIME THAT PASSED DURING THE FEDERAL COURT STAY AGAINST PETITIONER, WHEN THE STAY WAS OCCASIONED BY THE PROSECUTOR'S BAD FAITH, AND THEREBY DEPRIVE PETITIONER OF A SPEEDY TRIAL, BOTH STATUTORY AND CONSTITUTIONAL.

The state courts assumed the time of the federal court stay should be counted against petitioner, and on that basis summarily concluded no constitutional speedy trial time had run. No legal or factual basis for this assumption was ever articulated, though presumably the reasoning is that the stay occurred at petitioner's request. Petitioner asserts here that the biggest portion of the delay, a federal court stay, resulted from the prosecutor's misconduct, and thus should be chargeable to the State. Thus, the delay of over two years, with a bad faith prosecution pending, constitutes a significant violation of petitioner's constitutional right to a speedy trial. The State is

responsible to bring a defendant to trial in a timely manner. *Strunk v. United States*, 412 U.S. 434, 436-37, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973). The prosecutor chose to make her religious disagreement with petitioner and his fellow picketers a political, personal and official issue. She created the circumstances giving rise to the need for the stay, as a state official. All of this occurred exclusively within her control, and completely outside of the control of petitioner. The fact that petitioner properly exercised legal rights, and obtained some relief in federal court, should not be counted against him.

What actually happened is this: After the Kansas federal court issued an opinion in late December 1993 – quoted earlier in this petition – denying the prosecutor summary judgment in the federal court action for relief from bad faith prosecution, the prosecutor *voluntarily entered a mutual stay order*. Thus, the stay order was entered *after* a federal judge issued a lengthy order citing evidence of bad faith and selective prosecution, and voluntarily on the prosecutor's part. Under these circumstances, the period of the stay should be charged against the State.

Further, this case came to trial on the heels of a series of criminal prosecutions by this same prosecutor against various of the picketers. From July through December, these picketers were occupied for thousands of hours in criminal courts, responding to bad faith prosecutions, the vast majority of which resulted in dismissals or acquittals. All along the way, the prosecutor's bad faith and improper motive and deeds were raised, over and over. Against this back drop, once this case was activated, after the stay was lifted, and after it was assigned to an out-of-county judge, the motion was filed regarding speedy trial. The motion was filed expeditiously, and petitioner did not sit on his rights improperly.

Petitioner suffered prejudice by the delay. The greatest

prejudice – of which the state courts and prosecutor make light – was the pendency of a bad faith prosecution. That is extremely prejudicial as a matter of law. Further, the state gained an *immense* tactical advantage during the two years and three months of delay from the time this case was filed to the time it went to trial. Throughout this period, the prosecutor was systematically using the media to promote a harsh message against these picketers, regularly accusing them of being criminals and hatemongers. This case was tried 30 miles from Shawnee County, in a city with an overlapping media. The record bears many details of these circumstances, all of which reflect that this two year and three month period was particularly prejudicial to petitioner under all the circumstances.

CONCLUSION

Without explanation, the Kansas Court of Appeals held that criminal defendants have no right to a speedy arraignment. This holding is inconsistent with the purpose of an arraignment, and is alarming in terms of the potential impact on the constitutional rights of criminal defendants. There would be little purpose in affording criminal defendants a constitutional right to an arraignment, if the arraignment can occur at any time in the proceedings. That possibility is demonstrated here, where petitioner was arraigned the day of trial. Worse, in so holding, the state courts effectively deprived petitioner of his right to a speedy trial.

This Court has held that the full circumstances of the delay must be reviewed to determine if a constitutional right to a speedy trial has occurred. See *Doggett v. United States*, *supra*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The full circumstances of this case reflect that defendant was forced to respond to a bad faith prosecution for two years and three months; was not arraigned until the day of trial according to the State; and was forced to go to trial at the hands of a scandalously biased prosecutor. There is no justification, under the Constitution of the United States, for permitting this conviction to stand.

Respectfully submitted,

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Supreme Court, U.S.
FILED

98 152 JUL 20 1998

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
October Term, 1998

Charles F. Hockenbarger,
Petitioner

vs.

State of Kansas

ON PETITION FOR WRIT OF CERTIORARI
TO THE KANSAS COURT OF APPEALS

APPENDIX TO:
PETITION FOR WRIT OF CERTIORARI

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A. ORDER OF THE KANSAS COURT OF APPEALS DATED FEBRUARY 20, 1998.

No. 76,317

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHARLES F. HOCKENBARGER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; ROBERT J. SCHMISSEUR, judge. Opinion filed February 20, 1998. Affirmed.

Margie J. Phelps, of Topeka, and *Chris R. Davis*, of Phelps-Chartered, of Topeka, for appellant.

James A. Brown, assistant district attorney, *Joan M. Hamilton*, district attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before BRAZIL, C.J., GREEN,J., and D. KEITH ANDERSON, District Judge, assigned.

Per Curiam: This is an appeal by Charles F. Hockenbarger from a conviction by a jury of battery and criminal restraint. On appeal, Hockenbarger raises a number of issues, including lack of a speedy trial, selective prosecution, insufficient evidence, and abuse of discretion at sentencing. We disagree and affirm.

Hockenbarger is a member of the Westboro Baptist Church (WBC). Along with other members of WBC, Hockenbarger participates in anti-homosexual picketing of various public and private

establishments, including churches. William G. Weeks is the pastor of First Lutheran Church in Topeka. On Sunday, September 5, 1993, Hockenbarger and several other WBC members picketed the outdoor morning worship services of the First Lutheran Church. In response to this picketing, Weeks went with a hammer and his own sign to where the picketers were congregated along the public sidewalk in front of the church property. There, a conflict between Weeks and the picketers developed.

In a complaint filed October 7, 1993, Hockenbarger was charged with one count of battery and one count of unlawful restraint against Weeks. Three other WBC picketers who were involved in the dispute were also charged in the same complaint.

Even though a clear understanding of the

facts has been made difficult because of Hockenbarger's failure to furnish a complete record of the transcript, we now turn our attention to the facts in this case.

While standing a few feet in front of the picketers who were lined up along the public sidewalk with their picket signs singing a hymn, Weeks hammered a sign in to the church property. After situating the sign and with the hammer in his hand, Weeks walked off to his right, moving closer to the sidewalk as he went. Weeks testified that he told the picketers they were disturbing the worship service and that the church would call the police if the picketers came onto its property. Weeks testified that when he first arrived with the sign somebody yelled out to him, "'fag,'" and that after he had finished hammering the sign into the ground, someone called him a "'butt-fucking sodomite.'"

Bryce Cripps, a member of Weeks' congregation, testified that, after Weeks hammered the sign into the ground, Weeks walked over to the sidewalk near the exit lane leading from the church lot, bent down, and hit the ground in front of the sidewalk with the hammer near where the picketers were standing. Cripps testified that some women picketers seemed to be closest to Weeks. Cripps, who had been viewing this from a distance, started walking toward Weeks because a confrontation seemed to be developing and he wanted to get Weeks out of the situation. Weeks then started walking back parallel to the sidewalk; after Weeks took a couple of steps, Cripps saw him make a half-swing with the hammer, walk some more, and then pause. The rest of Cripps' testimony is not provided.

Elizabeth Phelps testified she and her sister, Margie Phelps, were standing on the sidewalk next

to George Stutzman and several others singing a hymn when Weeks, after hammering the sign into the ground, walked across the grass in their direction and started telling them to leave and to get off his property. Weeks then took the hammer and swung it near Margie's feet three times. The third blow struck the side of Margie's right shoe in the toe area, causing her to pull back and scream. Elizabeth said that Stutzman told Weeks to quit swinging the hammer, and Weeks responded by swinging it toward Stutzman, striking him with the handle of the hammer. Stutzman again told Weeks to stop it and Weeks swung again. The second swing missed Stutzman but caused the hammer head to fly off the handle. When Elizabeth looked in the direction where the hammer went, she saw Benjamin Phelps holding his chest as though he had been hit. Elizabeth said she ran across the street and called the police.

Officer Phillip Martin, who was one of the officers called to the scene, testified that Weeks demonstrated to the investigating officers how he hit the ground with the hammer near the feet of the picketers. Weeks indicated to Martin that he was upset that some of the picketers had their feet on church property.

Timothy Phelps, one of the defendants in the case, testified that he too saw Weeks bend over and hit the hammer on the ground near the picketers' feet, hitting Margie. He also saw Weeks swing the hammer twice at Stutzman.

Hockenbarger testified that he had been across the street putting away a picket sign when he heard a woman scream. When he ran over to investigate, he saw Weeks walking on the grass holding a hammer handle. Video footage shows that after a few

yards, Weeks moved onto the sidewalk and attempted to cross the line of picketers. The picketers, including Hockenbarger, would not let him pass. Jonathan Phelps snatched the hammer handle from Weeks' hand and told Weeks that he would not be hitting anyone else with the hammer. Weeks protested that he had only been hammering something into the ground, and Jonathan responded by calling him a liar.

Calling Weeks a "so-called priest" and other derogatory names, Margie Phelps asked Weeks for his name and informed him she was going to report him to the police for hitting three people, herself, George Stutzman, and Benjamin Phelps, with a hammer. Weeks looked down and, apparently believing someone was standing on church property, called out to a member of his congregation, directing her to call the police because the picketers were trespassing.

When Weeks persisted in attempting to cross the line of picketers toward the direction of the street, the picketers refused to let him pass. Weeks appeared surrounded. Hockenbarger then told Weeks that he was not going anywhere because he was under citizen's arrest, and some pushing and struggling occurred. Hockenbarger, Timothy Phelps, and several others, forced Weeks down to the ground where he was held down, chest to the ground, by Karl Hockenbarger, James Phelps, and, to a lesser extent, Hockenbarger.

Both Hockenbarger and Timothy Phelps testified that Weeks grabbed Hockenbarger by each wrist while he was standing among the picketers on the sidewalk. Hockenbarger said that at that point he felt he was being attacked and decided to perform a citizen's arrest. Hockenbarger testified that prior to that, he did

not really have information which would warrant keeping Weeks there; he had heard Margie's report of what happened but had not actually seen any attack by Weeks. Hockenbarger said that he and others managed to break Weeks' grip on his wrists and that he placed his arm around Weeks' neck and then released him. Hockenbarger and Timothy Phelps said that Weeks kneed Hockenbarger in the groin before being taken down to the ground. Neither Weeks' grabbing of Hockenbarger's wrists nor Weeks' kneeing him in the groin can be confirmed by the videotape due to positioning of the camera and participants.

The jury acquitted all the defendants except Hockenbarger, who was convicted on both accounts.

SPEEDY TRIAL

A. Statutory Right to a Speedy Trial.

K.S.A. 22-3402(2) provides that any person charged with a crime and held to answer on an appearance bond shall be brought to trial within 180 days after arraignment and shall be released from risk of conviction under the charge if the time limit is exceeded, unless the delay is due to the "application or fault of the defendant" or due to a continuance granted under K.S.A. 22-3402(3). No continuances were granted in this case. Hockenbarger argues that he was not brought to trial within the 180-day time limit, and he filed a motion to that effect on December 27, 1995, seeking dismissal on constitutional and statutory speedy trial grounds. Hockenbarger bases his statutory argument on the concept of a constructive arraignment, which he alleges occurred in this case on November 29, 1993, when notice

of a trial date was given.

K.S.A. 22-3205 provides:

> "(a) Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead....[I]f the crime charged is . . . a misdemeanor, with the approval of the court, the defendant may appear by counsel."

The complaint and affidavit against Hockenbarger were filed on October 7, 1993. After being arrested, he posted bond on October 12, 1993. Elizabeth Phelps filed a written appearance as counsel for Hockenbarger on the same day and filed a written request for a jury trial on October 14, 1993. On

November 29, 1993, a notice was sent scheduling the trial for February 2, 1994. Although Hockenbarger's brief refers to both November 22 and November 29, 1993, as the day notice of the trial date was set, November 29, 1993, seems to be the correct date based on remarks to the trial court and based on the appearance docket, which shows November 29 as the date notice was sent.

Hockenbarger's counsel testified that no motion for change of venue was filed in this case, but that motions to change venue were filed in other Phelps-related cases. The motions referred to are not in the record, nor does the record contain a motion to change venue in this case. Hockenbarger's counsel testified that the motion was argued December 8, 1993, at which time the judge was informed by defense counsel that the change could also be considered effective for the

defendants in this case. In a journal entry dated and filed December 20, 1993, the judge also granted what it termed as defendant's motion for change of venue in this case. A certification of venue to Lyon County was filed with the Kansas Supreme Court on December 22, 1993.

On January 4, 1994, the United States District Court for the District of Kansas issued an order of stay so that a federal complaint regarding the case could be resolved. The stay was lifted in an order dated and filed July 27, 1995.

On December 15, 1995, the Kansas Supreme Court filed an order transferring venue to Douglas County. It is not clear from the record if this additional transfer caused delay.

Hockenbarger's motion to dismiss for lack

of a speedy trial was heard and denied on January 11, 1996. At that time, the district court found that no arraignment had occurred in the case. Hockenbarger contends that, for all practical purposes, the requirements of arraignment were satisfied November 29, 1993, when notice was sent setting a trial date in response to Hockenbarger's written request for a trial. Using Hockenbarger's constructive arraignment date of November 29, 1993, Hockenbarger was brought to trial 6 days too late. However, using the formal arraignment date of January 12, 1996, there would be no statutory problem at all.

Hockenbarger asserts that his request for a jury trial acted as a waiver of arraignment not only effective against him, but also effective against the State for speedy trial purposes. Hockenbarger argues that arraignment was constructively satisfied by November 29,

1993, because he had a copy of the complaint, his counsel had filed an entry of appearance, and he had made it clear that he was pleading not guilty by requesting a jury trial.

The Kansas arraignment statute has been strictly construed to require fulfillment of each statutory element before arraignment is deemed to have occurred for speedy trial purposes. See, *e.g., State v Smith,* 247 Kan. 455, 458-60, 799 P.2d 497 (1990)(arraignment had not occurred where neither defendant nor counsel appeared before the court to enter a plea and the complaint had not been filed); *State v. Rosine*, 233 Kan. 633, 669, 664 P.2d 852 (1983)(no arraignment where no complaint had been filed).

Arraignment in a criminal proceeding is a *formal* act and is to be conducted in *open court* either by

the defendant personally or, in misdemeanor cases, by either the defendant or, upon leave of court, by counsel. K.S.A. 22-3205(a); *Rosine*, 233 Kan. 633, Syl. ¶ 3. The only time a *formal* arraignment was conducted in *open court* in this case was on January 12, 1996, the date of trial. Using this date, there was no violation of the statutory right to a speedy trial.

B. *Constitutional Right to a Speedy Trial*

Hockenbarger also argues that if the only arraignment recognized by this court occurred on January 12, 1996, then his constitutional right to a speedy arraignment was violated. There is no constitutional right to a speedy arraignment per se, and there is no statutory time limit on arraignment in misdemeanor cases.

As a result, Hockenbarger is left with only a constitutional speedy trial claim. In *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed.2d 101, 92 S. Ct. 2182 (1972), the United States Supreme Court set out a four-part balancing test to be applied on a case-by-case basis: (1) length of the delay; (2) the reason for the delay; (3) whether defendant asserted his or her right to be brought to trial speedily; and (4) prejudice to the defendant. The length of the delay is a triggering mechanism--until there is some delay giving concern as to prejudice, there is no need to inquire into the other three factors. See *State v. Smith*, 247 Kan. at 459-60.

The delay in this case, between charging and trial, was roughly 2 years and 3 months. Nevertheless, the evidence showing a speedy trial violation is woefully lacking. First, roughly a year and a half of the delay is attributable to Hockenbarger because

of the motion for change of venue and the stay which was ordered to resolve a federal case brought by Hockenbarger and others to enjoin their prosecution. See *Phelps v. Hamilton*, 840 F.Supp. 1442 (D.Kan. 1993). Second, there are no allegations and there is no evidence that the portion of the delay attributable to the State was deliberate. In addition, we note that the State was originally ready for trial in February 1994, but the entry of the stay required this trial date to be canceled.

Hockenbarger did not assert his speedy trial right until several months after the stay was lifted. Moreover, Hockenbarger argued unsuccessfully in federal court that the lifting of the stay was an abuse of discretion. *Phelps v. Hamilton*, 122 F.3d 1309, 1324-25 (10th Cir. 1997).

Finally, there is no indication from the

available record that Hockenbarger's ability to defend his case was prejudiced by the wait. There is no indication that witnesses or evidence were lost or that memories faded, and the videotape was available to refresh memory for at least part of the events of September 5, 1993. There is also no evidence that the State gained a tactical advantage from the delay. See *State v. Wilson*, 227 Kan. 619, 624-25, 608 P.2d 1344 (1980)(discussing some possible claims of prejudice). When all of the above factors are balanced, Hockenbarger has failed to show a violation of his constitutional right to a speedy trial.

JURY INSTRUCTIONS

Hockenbarger takes exception to two jury instructions: Instruction 25, mistakenly referred to as number 24 by Hockenbarger, and Instruction 28.

Instruction 25

Instruction 25 states: "You are instructed that every person has a right to resist an unreasonable citizen's arrest and a person may use such reasonable force as is necessary to prevent the arrest." Although the State asserts that Hockenbarger failed to object to this instruction prior to the jury retiring to consider its verdict, it is clear from Hockenbarger's counsel's statements at the instruction conference that he was objecting to the instruction as not being a fair statement of the law.

If jury instructions fairly and properly state the law as applied to the facts of the case, and if the jury could not reasonably have been misled by the content of the instructions, then reversible error will not arise from the instructions even though they may be erroneous in some small way. *State v. Aikins*, 261 Kan. 346, Syl. ¶ 25,

932 P.2d 408 (1997). Hockenbarger asserts that Instruction 25 misstates the law. Hockenbarger relies on K.S.A. 21-3217, which states:

> "A person is not authorized to use force to resist an arrest which he knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful."

Hockenbarger interprets K.S.A. 21-3217 as prohibiting resistance of any citizen's arrest, regardless of whether the citizen's arrest is performed at the direction of a law enforcement officer. Hockenbarger cites *State v. Miller*, 257 Kan. 844, 849, 896 P.2d 1069 (1995), and *State v. Franz*, 9 Kan.App.2d 319, 320, 676 P.2d 157 (1984), as support for this interpretation; however, these cases are easily distinguishable. *Miller*

simply holds that an officer conducting an arrest outside of his jurisdiction is generally treated as a private person conducting a citizen's arrest. 257 Kan. 844, Syl. ¶ 1. Resistance of the arrestee was not part of the facts of that case. *Franz* involved a suspect resisting arrest by a law enforcement officer. This court noted that there is no right to resist such an arrest, even if it is lawful. 9 Kan.App.2d at 320. There is no indication in *Franz* that the officer was operating outside his jurisdiction or that he was otherwise to be viewed as a private citizen.

Interpretation of a statute is a question of law over which this court exercises unlimited review. *State v. Arculeo*, 261 Kan. 286, Syl. ¶ 1, 933 P.2d 122 (1997). The mention or inclusion of one thing in a statute generally implies the intent to exclude another. *State v. Luginbill*, 223 Kan. 15, 20, 574 P.2d 140 (1977). By specifically mentioning the circumstances where a

person is not authorized to resist what he or she believes to be an unlawful arrest, the legislature implicitly intended to exclude other circumstances from the rule. If the legislature had wanted to prohibit resistance to *all* unlawful citizen's arrests, it would have said so. Hockenbarger cites no statute or case law in Kansas which prohibits resistance to an unlawful citizen's arrest when the arrest is performed without police direction or supervision. As a result, the instruction does not misstate the law applicable to the situation in this case.

Hockenbarger says, in passing, that the use of words "unreasonable citizen's arrest" instead of "unlawful citizen's arrest" in the jury instruction compounded the asserted error. Hockenbarger does not say in what way the jury was misled, and, having attacked the instruction by arguing that a person may not resist an *unlawful* citizen's arrest, Hockenbarger himself seems to

have interpreted the instruction as referring to an unlawful citizen's arrest. While the words "unreasonable" and "unlawful" are certainly not interchangeable in every case, in this case, the use of the word unreasonable could not have misled the jury to Hockenbarger's prejudice.

Instruction 28

Hockenbarger also alleges error from the giving of Instruction 28, which states:

> "A person is not permitted to provoke an attack on himself or another person with the specific intention to use such attack as a justification for committing a crime upon the person he provoked and then claim self-defense as a justification for committing a crime upon the person he provoked."

This instruction is a slightly modified version of PIK Crim. 3d 54.21. At the instruction conference, Hockenbarger told the trial court that if the instruction was given, then he also wanted an instruction which made clear to the jury that mere words are not provocation; there must be something more to either incite a reasonable person to attack or to place a reasonable person in fear of imminent attack. The trial court gave an additional instruction that words alone, no matter how insulting or contemptuous, may not serve as justifiable provocation without circumstances causing a reasonable person to believe that he or another person was in imminent danger of attack. This instruction adequately responded to Hockenbarger's only objection to the provocation instruction.

SUFFICIENCY OF THE EVIDENCE

Hockenbarger argues that there was insufficient evidence to find him guilty beyond a reasonable doubt. When a criminal defendant challenges the sufficiency of the evidence, the appellate court reviews all the evidence, viewed it in the light most favorable to the prosecution, and determines whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Knighten*, 260 Kan. 47, Syl. ¶ 1, 917 P.2d 1324 (1996).

Although Hockenbarger has failed to provide a full record of the trial, he attempts to remedy this deficiency by repeatedly referring to evidence and alleged facts not contained in the record on appeal. An appellant has a duty to provide a complete record of all matters upon which review is sought and error claimed. *State v. Cady*, 254 Kan. 393, 400, 867 P.2d 270 (1994). Assertions in a brief will not remedy an inadequacy in

the record. *Smith v. Printup*, 254 Kan. 315, 353, 866 P.2d 985 (1993).

Hockenbarger also argues that the acquittals of the other defendants require reversal of his conviction because, he asserts, the evidence with regard to all was the same. It has long been recognized in this state that there need not be rational consistency between the verdicts of two or more defendants tried together. *State v. Sully*, 219 Kan. 222, 229, 547 P.2d 344 (1976). Therefore, even if a more adequate record could support his assertions that the evidence with regard to all of the defendants was the same, his argument fails.

ARGUMENT AND REMARKS

Hockenbarger argues that the jury was prejudiced by improper argument and remarks made by

the prosecutor and her witnesses "[t]hroughout the trial" regarding his religious beliefs and picketing activities. Hockenbarger's argument does not state exactly what remarks he considered objectionable and does not cite to any portion of the record where the alleged objectionable statements were made, let alone to where contemporaneous objections were interposed to preserve the issue for appeal. As a result, we will not address this issue.

EXCLUSION OF EVIDENCE

Hockenbarger argues that the trial court causes reversible error by refusing to allow Elizabeth Phelps to testify regarding an alleged prior incident involving Weeks on July 16, 1993. After the prosecutor objected to Elizabeth Phelps being questioned about the incident based on relevancy, defense counsel proffered

that the testimony would be that Weeks drove his car toward a picketer. Hockenbarger asserted the testimony was relevant to show Weeks' state of mind and to show prior misconduct directed at a picketing event.

The trial court responded that the evidence was not proper coming from Elizabeth Phelps to show Weeks' state of mind because Weeks had not been convicted of a crime and the testimony would consist merely of allegations. When asked if he disagreed with the trial court's assessment of the law on that point, defense counsel responded that he did not disagree.

Defense counsel then stated that the evidence was nevertheless relevant to impeach Weeks' testimony that he had not had prior dealings with the picketers. However, when the trial court and the parties examined the record of Weeks' testimony they

discovered no such assertion by Weeks. Weeks had simply said that his congregation had not experienced the picketers there at the church on any prior occasion.

There was no error upon which reversal can be predicated in this case. Defense counsel agreed that the evidence was not admissible with regard to Weeks' state of mind and thus failed to preserve the right to argue that point on appeal. As for use of the testimony for impeachment purposes, there was nothing to impeach. Even if the trial court had erred, errors in the exclusion of evidence which do not affirmatively prejudice the substantial rights of the complaining party to do require reversal. K.S.A. 60-261; *State v. Lolar*, 259 Kan. 682, Syl. ¶ 2, 914 P.2d 950 (1996).

MULTIPLICITY

Hockenbarger argues that his convictions for criminal restraint and battery were multiplicitous. Hockenbarger notes that, prior to participating in taking Weeks down to the ground and holding him there, he placed his arm around Weeks' neck for a few seconds and then released it. Hockenbarger assumes this is the only basis on which the jury might have concluded he committed two separate crimes, and he argues that his actions were not enough to constitute two separate offenses.

"Multiplicity is the charging of two or more counts in a complaint where only a single criminal offense is involved." *State v. Fritz*, 261 Kan. 294, Syl. ¶ 3, 933 P.2d 126 (1977). Hockenbarger relies on *State v. McClanahan*, 251 Kan. 533, 836 P.2d 1164 (1992), to argue that the acts supporting each charge were done pursuant to a single impulse--to effect a citizen's arrest--

and that he could not, therefore, be convicted of separate crimes. Hockenbarger's reliance on *McClanahan* is misplaced.

As stated in *Fritz*, "[t]he test to determine whether the charges in a complaint or information are multiplicitous is whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous." 261 Kan. 294, Syl. ¶ 4.

Applying this test to the present case, we determine that the convictions are not multiplicitous. In order to prove criminal restraint, the State had to prove that Hockenbarger knowingly, and without legal authority, restrained Weeks so as to interfere substantially with Weeks' liberty. See K.S.A. 21-3424(a). To prove battery, the State had to prove that

Hockenbarger intentionally caused physical contact with Weeks in a rude, insulting, or angry manner. See K.S.A. 21-3412(b). Criminal restraint requires substantial interference with the victim's liberty, while battery requires no such interference. Battery requires physical contact in a rude, insulting, or angry manner, while criminal restraint does not require any touching. Each offense requires proof of an element not required by the other offense. As a result, the charges were not multiplicitous.

SELECTIVE PROSECUTION

It has long been recognized that decisions regarding who and when to prosecute are within the sound discretion of the prosecutor. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 528, 646 P.2d 1091 (1982). However, this discretion is not boundless and must not

be used to unfairly discriminate or to punish individuals for the exercise of protected rights. 231 Kan. at 529. Where this precept is violated, it can be a valid defense to a criminal charge. 231 Kan. at 528. A defendant claiming selective or discriminatory prosecution must establish: (1) that others "similarly situated are not generally prosecuted for conduct similar to that for which defendant is being prosecuted" and (2) that the defendant "has been intentionally and purposefully singled out for prosecution on the basis of an arbitrary or invidious criterion [citation omitted]" such as religion, race or exercise of a constitutional right. 231 Kan. at 528.

Test Part One: Selective Charging

To support his claim that others similarly situated are not prosecuted, Hockenbarger offered the

testimony of WBC members who described several occasions of conflict between WBC picketers and non-WBC individuals where, he contends, WBC members were prosecuted but others who have attacked and victimized the WBC picketers have not been prosecuted.

Test Part Two: Improper Motive

As evidence that his group is being prosecuted for improper motives, particularly Hamilton's dislike of them and Hamilton's desire to squelch their freedom of expression and religion, Hockenbarger offered numerous anecdotes and documents which, he asserts, reveal Hamilton's strong disagreement with their anti-homosexual message and her intention to prevent them from or punish them for continuing with their constitutionally protected picketing activities.

Nevertheless, after reviewing the evidence, we conclude that Hockenbarger has failed to meet the first prong of the test, that is, whether others similarly situated are generally not prosecuted for the same illegal activity. As a result, Hockenbarger's argument fails.

DISQUALIFICATION OF A PROSECUTING ATTORNEY

Hockenbarger argues that the trial court erred in failing to disqualify the district attorney. The question of whether there is a conflict of interest or appearance of impropriety which justifies disqualification of a prosecuting attorney lies within the discretion of the trial court. *State v. Goodnow*, 12 Kan.App.2d 294, 299-300, 740 P.2d 113, *rev. denied* 242 Kan. 904 (1987). In this case, it was clear that Hamilton and the WBC picketers shared a mutual and public hostility toward

each other. Even so, Hockenbarger was required to show actual prejudice to his right to a fair trial. Because Hockenbarger has failed to furnish a sufficient record to determine whether actual prejudice occurred, his argument fails.

SENTENCING

Hockenbarger argues that the restriction on his picketing as a condition of probation was an abuse of discretion because it imposed a prior restraint on lawful religious activity without reasonable justification. A sentencing court has broad discretion in setting conditions of probation. *State v. Evans*, 14 Kan.App.2d 591, 592, 796 P.2d 178 (1990). Probation conditions which restrict certain religious activities are not necessarily improper. 14 Kan.App.2d at 593. Where probation conditions restrict constitutional rights, the

restrictions must bear a reasonable relationship to the goals of rehabilitation, protection of the public, and the nature of the offense. 14 Kan.App.2d at 592.

The restrictions in this case bear a reasonable relationship to the above goals and are not oppressive. Hockenbarger is not prohibited from engaging in all religious picketing, only from picketing in the few places where he is sure to come into the close vicinity of the victim or the State's witnesses. Considering that Hockenbarger's picketing was the catalyst for the confrontation in this case, we determine that the restriction is carefully tailored to avoid future similar confrontations between Hockenbarger, Weeks, and a few others closely related to the case. For this reason, the trial court did not abuse its discretion.

PROSECUTOR'S REMARKS

Hockenbarger argues that the sentencing process was tainted by prejudicial remarks made by the prosecutor at the sentencing hearing. At the sentencing hearing, the prosecutor explained that she had notified Weeks of his right to be present at sentencing, but that Weeks opted not to come because Weeks had received a letter from Hockenbarger's father. The prosecutor explained that Weeks also decided not to provide the trial court with a written statement because his church's attorney and insurance carrier advised him against making any statements. Hockenbarger argues that these remarks were improper and unsupported hearsay. He asserts that they prejudiced the sentencing process.

There was no objection to the remarks at sentencing, and, in any case, there is no indication from the trial court's comments or from the sentence that the trial court was in any way prejudiced against

Hockenbarger due to the prosecutor's statements. Absent a showing of prejudice, this issue does not require setting aside the sentence. See *Cabral v. State*, 19 Kan.App.2d 456, 464-65, 871 P.2d 1285, *rev. denied* 255 Kan. 1000 (1994).

Affirmed.

B. ORDER DENYING REHEARING OR MODIFICATION OF THE KANSAS COURT OF APPEALS DATED MARCH 19, 1998.

COURT OF APPEALS ORDER
DISTRICT CASE NO. 93CR2834

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

CHRIS R DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

STATE OF KANSAS, APPELLEE,
v. NO. 96-76317-AS
CHARLES HOCKENBARGER, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY CHARLES HOCKENBARGER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 03/19/98.

CAROL G. GREEN
CLERK

C. ORDER DENYING PETITION FOR REVIEW OF THE KANSAS SUPREME COURT DATED APRIL 28, 1998.

SUPREME COURT ORDER
DISTRICT CASE NO. 93CR2834

IN THE SUPREME COURT

OF THE STATE OF KANSAS

CHRIS R DAVIS
PHELPS CHARTERED
1414 S TOPEKA BLVD
P O BOX 1886
TOPEKA KS 66601-1886

STATE OF KANSAS, APPELLEE
v. NO. 96-76317-AS
CHARLES HOCKENBARGER, APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY CHARLES HOCKENBARGER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 04/28/98.

CAROL G. GREEN
CLERK

D. PARTIAL TRANSCRIPT OF HEARING ON MOTIONS TO DISMISS DATED JANUARY 11, 1996.

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

STATE OF KANSAS,	)
Plaintiff	)
	)
Vs.	)Case No. 93-CR-2834
	)
CHARLES F. HOCKENBARGER,	)
Defendant.	)

VOLUME I
TRANSCRIPT
OF
MOTION TO DISMISS; IN RE: SPEEDY TRIAL
MOTION TO DISMISS; IN RE: PROSECUTORIAL BIAS OR SELECTIVE PROSECUTION
MOTION TO SEVER; IN RE: MARGIE PHELPS
MOTION TO QUASH SUBPOENA DUCES TECUM; IN RE: CHRIS DAVIS
MOTION TO QUASH SUBPOENA; IN RE: GEORGE STUTZMAN
MOTION IN LIMINE
STATE'S MOTION TO ENDORSE ADDITIONAL WITNESSES
FORMAL ARRAIGNMENT: IN RE: MARGIE PHELPS

Hearing date: January 11, 1996.

* * *

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* * *

MR. DAVIS:

* * *

In this case, the complaint and affidavit were filed and the defendants had a copy of it. Further, Your Honor, they were scheduled to appear on December -- or -- I mean -- excuse me -- October 21, of 1993; and that was the reason. Because they were scheduled to appear on that, that was the reason for filing the demand for jury trial, was to forego that. They didn't need to appear if they'd already requested a jury trial. That means they pled. They had their affidavit and complaint. There's no need for them to appear, and they did not appear on that date; and it is the practice in Shawnee County that if you have demanded a jury trial prior to the first appearance, then you don't appear on the first appearance date, which is the date that the -- a plea would have been taken.

THE COURT: One of the dangers of local custom is that, sometimes, we get so wrapped up in local custom we may forget the -- what the statute says, what the Constitution says, what the appellate authorities say.

* * *

(Pg. 20)

MR. DAVIS: Just a moment, sir. As for local custom, Your Honor, these defendants, I'm sure you're aware, they are bound by whatever that local custom is.

THE COURT: The problem is, I don't know what the local custom is.

* * *

(Pg. 22)

MS. HAMILTON:

* * *

(Pg. 24)

The case was filed on October 7th. At the time that a bond is posed, it is true that the defendants, at that time, are given an

appearance date to appear at a docket; and that appearance docket, if you look on the warrant, or, the bond, because the State doesn't have a copy of it, and I'm hoping it's in the file, was set for October 21st. A docket was to be called; and in Shawnee County, again, with misdemeanors, the defendants don't have to appear if counsel appear for them and waive the appearance, but that is the first appearance, or, quote, "arraignment," of the defendants.

* * *

(Pg. 179)

THE COURT: Thank you. The request to disqualify or to dismiss, to disqualify and for other appropriate relief is denied with this one comment: There was a -- The third request was that there be no harassing or intimidating or etcetera. I don't intend for anybody to do any harassing or intimidating.

As I commented earlier, I can think of several times in front of the jury that I have admonished counsel, parties of family members, or others if I thought their conduct was inappropriate. I can think of one time that the sheriff of Stafford County, Kansas, in

my opinion, was signaling answers to a deputy, and in front of the jury, I admonished him that that was inappropriate, and directed that he leave the courtroom.

I can think of a time in a medical malpractice jury trial where I, in front of a jury, admonished a lawyer that his conduct was inappropriate in putting his head down on the table when the other lawyer would start to make arguments and matter of that nature.

I don't intend for anybody to harass or intimidate, and if somebody thinks there's some of that going on, -- I've only got two eyes and two ears -- you bring it to my attention privately, rather than publicly, and I will sure attempt to deal with it.

I don't consider this matter as resolved merely because it's been reviewed, the same issue, by three or four other different courts. I would agree with some of the commentary in the opinions that political speech during a political campaign is probably as strongly protected speech as we have in this country, and that political speech has always received special treatment of -- of all

different types of public expression.

The Court is satisfied that, while there may be some very sincere and strong difference of opinion as to whether or not Miss Hamilton properly exercises her discretion in this matter, the fact that her office has prosecuted people who have committed crimes against members of the Westboro Baptist Church or the Phelps family, that there have been, apparently, multiple occasions that they have declined – the Shawnee County District Attorney's office has declined to prosecute members of Westboro Baptist Church or the Phelps family when requested to do so, is a prima facia showing that there's nothing inappropriate. The matter will be resolved on the facts and evidence of this case, and I -- I will try to pay particular attention that there's no insertion of any personal matters by counsel in this case.

* * *